

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)	COURT FILE
CHERYL SAGATAW and DeANTHONY)	NO. 24-CV-1 (ECT/TNL)
BARNES, <i>on behalf of</i>)	
<i>themselves and a class of</i>)	
<i>similarly-situated individuals,</i>)	
)	
Plaintiffs,)	
)	
vs.)	
)	
MAYOR JACOB FREY, <i>in his</i>)	
<i>individual and official</i>)	
<i>capacity,</i>)	Courtroom 7A
)	Wednesday, January 3, 2024
Defendant.)	St. Paul, Minnesota
)	2:00 P.M.

HEARING ON

**PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION**

**BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE**

TIMOTHY J. WILLETTE, RDR, CRR, CRC
Official Court Reporter - United States District Court
Warren E. Burger Federal Building & U.S. Courthouse
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* * * *

1 (2:00 p.m.)

2 **P R O C E E D I N G S**

3 **I N O P E N C O U R T**

4 THE COURT: Good afternoon, everyone. Please be
5 seated.

6 We are here this afternoon for a hearing on what
7 is styled as a motion for a temporary restraining order in
8 Cheryl Sagataw and DeAnthony Barnes versus Mayor Jacob Frey.
9 This is Civil File Number 24-1.

10 Let me at this time invite counsel to note their
11 appearances, starting with the plaintiffs.

12 MS. KELLEY: Good afternoon, Your Honor. This is
13 Attorney Kira Kelley for the plaintiffs.

14 THE COURT: Good afternoon.

15 And who do we have on behalf of the Mayor?

16 MS. ENSLIN: Good afternoon, Your Honor. Sharda
17 Enslin, the attorney for the City of Minneapolis, here on
18 behalf of Mayor Jacob Frey. Along with me I have my
19 colleagues Heather Robertson, Kristin Sarff, and Hayes
20 Hansen.

21 THE COURT: All right, terrific. Good afternoon
22 to all.

23 All right. This is Plaintiffs' motion. I
24 indicated earlier that it was styled as a motion for
25 temporary restraining order. Typically Rule 65 contemplates

1 the temporary restraining orders are issued ex parte and
2 without notice. We're sort of past that point here, and so
3 I would think it is more appropriately referred to as a
4 preliminary injunction request, but please feel free to let
5 me know if you disagree with that, Ms. Kelley, but let's
6 hear from you first.

7 MS. KELLEY: Thank you, Your Honor. And should
8 I -- may I approach the podium?

9 THE COURT: Please. And while you're walking
10 there, I think I will have questions, but what I'll do is
11 instead of sort of leading with those out of the gate what
12 I'll do is try to ask those where they seem to fit within
13 the context of your argument.

14 MS. KELLEY: That sounds great, Your Honor.

15 Am I correct in assuming I should plan for
16 approximately 20 minutes or perhaps save some time to
17 respond, maybe a 15 and five split?

18 THE COURT: Particularly owing to the speed with
19 which the motion was filed and the relative haste with which
20 we are proceeding, I'm going to invite you to take the time
21 that you think you reasonably need --

22 MS. KELLEY: Okay.

23 THE COURT: -- to tell me about your position and
24 your clients' position in this case and I'm going to invite
25 the City to do the same. I will give you an opportunity for

1 rebuttal whether you reserve time or not once the City's
2 done arguing, or once the Mayor is done arguing, I should
3 say.

4 MS. KELLEY: Okay. Thank you, Your Honor. I
5 appreciate that. And I agree with your assessment regarding
6 Rule 65(b) and I'm sure you know the **S.B. McLaughlin** case.
7 The standard is the same whether it's a PI or a TRO.

8 First off, thank you, Judge Tostrud, and thank you
9 to the court staff for making this hearing happen. I know
10 that temporary restraining orders or preliminary injunctions
11 are a scheduling challenge for everyone, and this is all
12 happening over the holidays. It's a quick notice, quick
13 turnaround, and we're all scrambling, but I just -- I really
14 appreciate and my clients really appreciate this opportunity
15 to be heard, so thank you for that.

16 And we'll keep it simple. We're not here to waste
17 anybody's time. We're here because Camp Nenookaasi
18 community members, government officials from multiple
19 departments, agencies, and jurisdictions, and the residents
20 themselves are working together, are realizing that the best
21 way to address the crisis that unhoused populations
22 experience is for people to meet each other where they're at
23 and to engage in and with encampments by supporting people,
24 moving them from interim stability to permanent stability,
25 rather than forcing them to disperse, making problems worse

1 and keeping people stuck in a vicious cycle.

2 This lawsuit is narrowly tailored both in causes
3 of action and in defendants. I'm sure we're all aware of
4 the lawsuit filed a few years ago by the ACLU and Minnesota
5 Legal Aid. We look to that. We look to interpretations of
6 law by Judge Wright, the Honorable Judge Wright, and we
7 ensure that we stick to claims that have merit, looking at
8 her interpretations for guidance. We're not throwing
9 spaghetti at the wall. We're not naming every potential
10 defendant under the sun. We chose to do that because Camp
11 Nenookaasi residents and organizers appreciate the support
12 that they've received from Hennepin County, from the City
13 Council, from state and local government officials across
14 the board.

15 This camp has been so successful in part because
16 it is a collaborative effort. The City Council declared
17 unsheltered homelessness a public health emergency, and that
18 declaration is Exhibit 2 of the Complaint. Eight members of
19 City Council issued a public letter to Mayor Frey begging
20 him to at least halt the evictions until February 24th.
21 That's attached as Exhibit 3 to the Complaint. And instead
22 of responding or engaging in this conversation, Mayor Frey
23 scheduled these evictions for January 4th.

24 We're asking the Court to enjoin the one person
25 standing in the way of this real team effort that is having

1 transformative impact. City Council, Hennepin County, state
2 social workers, nonprofit representatives, residents, and
3 neighbors, look how many people are behind this.

4 At this stage we're asking you to preserve the
5 status quo during the pendency of this case and there are
6 four familiar factors in that test. I'll run through them
7 one by one, but again, Your Honor, I invite questions at any
8 time. And the first of these four factors is irreparable
9 harm.

10 Now, that has two components. So the first
11 component is this question of is there an adequate remedy at
12 law, and that's often a financial consideration. Say this
13 case moves forward and we end up winning. Will money
14 damages make people whole again? And what's at stake here
15 is thinking about taking away everything that Camp
16 Nenookaasi has been able to provide for people and has
17 allowed them to provide for each other. And could monetary
18 damages years from now make Plaintiffs whole from these
19 injuries that are coming at them should this eviction move
20 forward?

21 And we know with addiction and with the opiate
22 crisis, these are real and serious issues. Change and
23 trauma are hugely destabilizing. Nenookaasi is a camp that
24 is rooted in principles of sobriety and helping people get
25 on the road to recovery. Relapse is all too likely when you

1 take that stability away from people.

2 THE COURT: Is there a factual dispute with what
3 the Mayor has said about things that have happened within
4 the camp?

5 MS. KELLEY: The mayor is I think attempting to
6 portray what's happening at camp from --

7 THE COURT: Sorry. I need to just interrupt
8 you --

9 MS. KELLEY: Yes. Go for it.

10 THE COURT: -- Ms. Kelley, and I apologize.

11 I'm hearing dings, which tells me that somebody's
12 got their phone on, and what I'm going to instruct you if
13 you are here with your phone on is to turn your phone off at
14 this time. Cell phones cannot be used in a federal
15 courtroom while proceedings are in process, and so I'll ask
16 that that happen at this time.

17 If it doesn't happen, I'll stop proceedings again
18 and instruct that we figure out who's got their phone on and
19 we may end up in a position where we have to invite that
20 person to leave to turn it off or take more particular steps
21 in that regard. I'd rather not do that.

22 Thank you. I appreciate it.

23 Ms. Kelley?

24 MS. KELLEY: Yes, Your Honor. You asked if there
25 was a factual dispute specifically regarding drug use at

1 camp or --

2 THE COURT: Well, we've got more serious
3 allegations. We've got allegations that an infant died in
4 the camp, and we've got allegations that someone died of a
5 drug overdose in the camp, and we've got allegations
6 regarding reports of human trafficking, or concerns of human
7 trafficking. And it seemed to me if I read the affidavits
8 and declarations fairly that those are not issues or
9 contentions with which the plaintiffs are taking issue.

10 MS. KELLEY: Yes, Your Honor. I think that's
11 accurate to say, and I can -- I was planning on addressing
12 this in the public interest section of this, but --

13 THE COURT: That's fine. That's fine.

14 MS. KELLEY: -- I could address it sooner if Your
15 Honor would prefer.

16 THE COURT: No. I'll leave it to your outline.
17 That makes fine sense to me for you to address it there.

18 MS. KELLEY: Thank you.

19 So we're talking about whether the harm of an
20 eviction could be adequately compensated by an award of
21 financial damages later on. And if somebody relapses, if
22 somebody overdoses, if somebody dies or suffers any of these
23 consequences as a result of an eviction, no amount of money
24 is going to bring them back. You can't put a price on
25 sobriety, or stability, or knowing where you're going to

1 sleep at the end of the day.

2 My client, Mr. Barnes, you read his declaration.
3 You know -- he lost his music in a prior eviction, he lost
4 what he was working on, his art, his creations. You can't
5 write the same song twice. And a lot of what Plaintiffs
6 stand to lose is sacred to them, or is hard fought with the
7 interim stability that camp provides for them to really make
8 some sort of a life, to be a springboard to permanent
9 stability, and you can't replace that springboard.

10 When people are evicted -- and we've seen this in
11 the declarations of people who have gone through this time
12 and time again when Defendant puts these evictions through,
13 is they lose everything, and every time you start over it
14 gets harder and harder to find the will to keep doing that.

15 And just lastly with the issue of the
16 irreparably --

17 THE COURT: Let me ask a question about that if I
18 could, Ms. Kelley. I don't doubt any of that. I'm in no
19 position to doubt it and it makes sense to me that those are
20 real concerns.

21 MS. KELLEY: Yes.

22 THE COURT: But talking about relapse
23 specifically, one of the things that the Eighth Circuit
24 tells me in binding precedent is that the issue -- or to
25 find that there is irreparable harm, I need to have a

1 measure of certainty that something like that's going to
2 occur and I need to be able to identify specifics.

3 Can you cite a case that reaches that kind of
4 conclusion on facts like the ones that we have here, or
5 what's the closest that you've got?

6 MS. KELLEY: Sure, Your Honor. And I appreciate
7 your attention to the declarations, because I really think
8 that this is where the heart of our legal support comes
9 from, is not so much does a case squarely address this
10 precedent, but has it happened before when evictions have
11 happened in the past.

12 And you can see in the declarations that -- I
13 believe it was -- let's see. You can look at the
14 declaration of Cheryl Sagataw, one of the representative
15 plaintiffs, paragraph 19:

16 "If Camp Nenookaasi is destroyed, I will still do
17 my best to get into treatment and stay connected to the
18 community we've built here, but it will be so much harder.
19 I don't know where I will go or where I will live. I don't
20 know where my belongings will end up. I won't be able to
21 carry all of my belongings, so most of my things will be
22 destroyed. Everything will become so much harder, and the
23 destruction of this camp will be deeply traumatic to me and
24 every other resident here. If I'm not here, I don't know
25 how RS Eden will contact me to let me know that a bed is

1 available. I'm worried that I will lose my spot and not get
2 into treatment if Camp Nenookaasi is destroyed."

3 And that's just one example. If we take that
4 declaration of somebody who's been through more evictions
5 than she could count or list in a declaration and you apply
6 it to the approximately 150 residents of the camp and say
7 what happens when all of these people scatter when they lose
8 their spots at treatments and housing, it's really a
9 question of people losing everything.

10 Did I answer your question, Your Honor?

11 THE COURT: It did. Thank you.

12 MS. KELLEY: And the last thing about just whether
13 monetary awards would be able to repair the harm is just --
14 how could my clients stay in touch with me if they are
15 scattered to even five years from now potentially benefit
16 from a monetary award? When I want to talk to my clients, I
17 go down to camp as do the other social workers, treatment,
18 service providers, housing workers, members of the City
19 government that are working to support this camp. I would
20 not know how to get in touch with my clients without this
21 camp. Many of them don't have phones, or if they did, their
22 phone got destroyed in the last eviction that they went
23 through.

24 And the second component of that first factor of
25 irreparable harm is that the harm must be certain and of

1 such great imminence. So we know the eviction is certain.

2 It's been posted and we can take the Mayor at his word.

3 And the other benefit in the legal analysis
4 unfortunately is just that we've seen these evictions happen
5 before. We've seen -- many or most of the represented
6 plaintiffs have experienced them directly, so they know
7 exactly what to expect. In the Mayor's memorandum he
8 mentions that there are policies in place and that there are
9 people who are going to be there and help people keep track
10 of their belongings, and you can look at the declaration of
11 Aaron Johnson, paragraphs 5 and 6, to -- excuse me, Your
12 Honor. It is paragraph . . .

13 THE COURT: Fifteen.

14 MS. KELLEY: Thank you, Your Honor. It is
15 paragraph 15 and paragraph 16 in particular, that there was
16 one worker present that -- there was attempts made by the
17 City to have spots open at shelters that just didn't
18 materialize, that weren't accessible, that despite best
19 intentions and despite policies allegedly being in place,
20 that's not what happens.

21 And you can also see in Cheryl Sagataw's
22 declaration as well just how in practice evictions have
23 worked for her. If you're not at camp when they come, if
24 you're at a medical appointment, visiting a friend, doing
25 any number of necessary daily things, you're meeting with a

1 housing worker, if you're anywhere else but at camp when
2 that happens, you don't even get the chance to run away with
3 an armful of your belongings.

4 And I will note just the last thing on that first
5 factor, that the destruction of a person's only living
6 quarters constitutes irreparable harm, and that's the **Higbee**
7 **vs. Starr** case out of the Eighth Circuit in 1983.

8 Now, the Mayor might argue that this isn't their
9 only living quarters, that shelter beds are available.
10 First and foremost, shelters are not living quarters. Camp
11 Nenookaasi, as you can see throughout the declarations, is
12 the safest place that many of my clients have felt since
13 they've become unhoused, that it is the interim stability
14 that's the best thing while they look for permanent
15 long-term housing, that a shelter -- if you're in a
16 partnership, you can't stay with your partner at a shelter
17 when they're split by gender. If you have a pet, you can't
18 bring your pet. If you want someplace to be during the day
19 in the freezing cold Minnesota winter, shelters often kick
20 you out at 7 o'clock in the morning and then you're spending
21 all of your time trying to find a place for the next night.

22 And if you look to the declaration of Claire
23 Nicole Glenn, you can see that even finding a place at a
24 shelter, even if beds are available, requires having a
25 phone, which many plaintiffs don't, or if they do, it may

1 very well be destroyed when everything is scooped up and
2 thrown in the trash. It requires having a charge on that
3 phone, which is hard to obtain when you're an unsheltered,
4 unhoused person. It means wading through different -- being
5 placed on hold, calling back. It's not accessible and
6 there's no room for people's belongings. You really lose
7 everything, including the ability to have your belongings
8 with you.

9 And there's also mention in the defendants'
10 memorandum of storage downtown, and as that memorandum
11 notes, nobody has used that. That's an unutilized offer,
12 because it's just not practical to have your belongings
13 stored downtown that you then have to go downtown to access.
14 People don't have cars, people don't have phones. It's not
15 a viable replacement to this interim housing as a substitute
16 to long-term housing.

17 And time and time again in this Complaint we just
18 see my clients, the plaintiffs, are making due with what
19 they have because the purported options that are available
20 to them just aren't viable. They're not functional. And to
21 expect somebody to check in every two weeks when they don't
22 have a car or a phone in order to maintain those
23 possessions, it's just not a risk with people's valuables
24 that they feel comfortable taking, that they're going to
25 have continued guaranteed access to them.

1 I'll move to the second factor unless you have any
2 other questions.

3 THE COURT: I do not.

4 MS. KELLEY: And that second factor of the
5 four-part test for injunctive relief is the likelihood of
6 success on the merits, and this requires a reasonable
7 probability or a fair chance on any one of these five causes
8 of action. I'll just briefly run through them.

9 The first count of the Complaint is unlawful
10 seizure of property in violation of the Fourth Amendment,
11 and we know that warrantless seizures are presumed unlawful
12 and that an unlawful seizure of belongings violates
13 possessory interests even if the seizure may be lawful at
14 its inception. It's not just the fact that things are
15 taken. It's the fact that they're permanently taken,
16 destroyed.

17 And the Fourth Amendment according to the Ninth
18 Circuit -- and again, we're in the Eighth Circuit, but we'd
19 ask this Court to find that very persuasive authority in a
20 well-reasoned opinion, the ***Coalition of Homelessness vs.***
21 ***City and County of San Francisco***. It says that the Fourth
22 Amendment protects homeless individuals from seizure and
23 summary destruction of their unabandoned but temporarily
24 unattended personal property.

25 And what that case and what my clients are asking

1 this Court to recognize is that these evictions are telling
2 unhoused people because you don't own a rental or a living
3 space, you don't get to have art, community, stability,
4 religious and spiritual mementos, that if you don't own a
5 home or at least rent one, then you can't own physical
6 property, even lifesaving medical supplies, sacred items,
7 the means to keep warm and the paperwork and identify
8 documents needed to keep up with and comply with systems of
9 ordered society, that you can only have those things if you
10 also have a place to put them, and that would be an
11 untenable proposition of law.

12 The second count of the Complaint is procedural
13 due process violations, and once again this involves looking
14 at a two-part analysis.

15 First, is there a deprivation of a property or a
16 liberty right, and then second, was that process used to
17 deprive Plaintiffs of that right adequate.

18 This eviction, as we've discussed, will result in
19 the destruction and deprivation of all of Plaintiffs'
20 belongings that they cannot carry away with them, and aside
21 from these posted eviction notices, there is no process.
22 There's just one notice posted on a bulletin board which is
23 attached as an exhibit to the Complaint, Exhibit 5. They
24 don't have a means to challenge this.

25 THE COURT: So it seems as though -- two things

1 here. The first is, it seems to me as though the better
2 take on the duration of notice that was provided is to go
3 back to, what was it, December 7th?

4 MS. KELLEY: This is the third notice posted.

5 THE COURT: Yes.

6 MS. KELLEY: The 19th was the second and the
7 original was December 14th.

8 THE COURT: 14th.

9 MS. KELLEY: Yes.

10 THE COURT: I thought the 14th was the first day
11 that the Mayor indicated he would clear the camp and then
12 notice was given before then.

13 MS. KELLEY: Correct, yes. The date was for the
14 14th, but the notice was given prior to that, yes.

15 THE COURT: On the 7th? Do I have that right,
16 or --

17 MS. KELLEY: I would trust your recollection on
18 that that, Your Honor.

19 THE COURT: I'm not sure I would, but that's why
20 I'm asking. It seems to me that in terms of assessing the
21 facts around the duration of the notice, the better answer
22 is to go back to the 7th. Do you agree or do you think that
23 that would be incorrect for some reason?

24 MS. KELLEY: I think that that would be incorrect,
25 Your Honor, simply because the date -- the period of time

1 prior to December 29th where the eviction was postponed
2 indefinitely coincided with this incredible collaborative
3 effort between City Council and other members of Minneapolis
4 and Hennepin County and residents and their supporters that
5 I think was an indication of potentially the eviction being
6 postponed until adequate interim solutions were agreed upon
7 by everybody. That there was a City Council meeting in
8 mid-December that tons of people showed up to, the City
9 Council heard hours of testimony, and I think it's in the
10 declaration of Nicole Perez that there was a meeting in late
11 December between residents and supporters and social workers
12 and City officials. Everybody who was invited, except for
13 Defendant Frey, chose -- attended except for him.

14 And it was really generative. There was other
15 solutions being proposed, such as moving the entire
16 community to a warehouse that's also discussed in Defendant
17 Frey's memorandum, and until December 29th, people thought
18 the eviction is postponed. Maybe they're waiting until we
19 work this out together.

20 But I think more to the point, Your Honor,
21 regardless of notice, due process requires notice and an
22 opportunity to be heard, and the fact is that in order to be
23 heard, my clients, these plaintiffs, had to file their own
24 lawsuit, that there was no other process. We wouldn't be
25 having this conversation if they hadn't found an attorney

1 and found the will even despite everything that they're
2 going through to come together and say no, we need to have
3 our constitutional rights heard by somebody with the
4 authority to do so, and if you have to file a lawsuit to get
5 your rights heard, there's no process.

6 THE COURT: The process that you describe in your
7 memorandum seems to me is sort of a continuation of the
8 political process that you've described here so far this
9 afternoon, is that fair?

10 MS. KELLEY: I might rephrase that, Your Honor, to
11 say that the process that exists is only what my clients
12 have made for themselves, that the Mayor here is seeking to
13 deprive them of these property and liberty rights and by so
14 doing has not created any process, so you have organizers
15 and supporters from the camp who are saying, well, we will
16 put ourselves on the edge and we will make time at City
17 Council. We will organize the community to talk to and
18 petition our elected officials because no process -- it's
19 not as though somebody came down and said, "Here's your
20 belongings, here's your notice. We are giving you an
21 opportunity to tell us that we can't do this." That
22 opportunity had to be self-created from the community.

23 THE COURT: But what more -- I mean, what more
24 process -- because I didn't see it in the brief. What more
25 process would turn this into an adequate situation from the

1 14th Amendment's perspective?

2 MS. KELLEY: I think that the adequate process
3 would be if the Mayor or his office were to be creating and
4 offering the types of opportunities that my clients here
5 have created and offered for themselves.

6 So we've got the City Council declaring a public
7 health emergency, but they don't have any meaningful power
8 to impact this. There are people everywhere who are saying
9 what's happening is not right, and by everywhere I mean
10 inside and outside government at multiple levels. But
11 there's no place to influence the decisionmaker by
12 presenting evidence, by asking that decisionmaker, who is
13 Defendant Mayor Frey, to apply the law to the facts, and
14 that would be an adequate process that just doesn't exist.

15 Would Your Honor like me to proceed to the
16 third cause of action or --

17 THE COURT: Certainly.

18 MS. KELLEY: The third cause of action is the
19 state-created danger, substantive due process violation
20 again under the 14th Amendment. And the state-created
21 danger concept applies when a government creates a danger
22 for its civilians, its constituents, and then is subject
23 because of that creation to a duty to protect those it
24 endangers, and failing to protect people from a danger that
25 the government creates is a due process violation.

1 In ***Fields vs. Abbott***, which is Eighth Circuit
2 precedent from 2011, there's a five-part test, and the first
3 part is that the plaintiffs must be members of a limited and
4 precisely definable group. That's fairly straightforward.
5 It's the residents of Camp Nenookaasi.

6 The second part of this five-part test is that the
7 municipality's conduct has to put them at significant risk
8 of serious, immediate and proximate harm, and we've
9 discussed this. It is about to be the heart of winter in
10 Minnesota and this is Plaintiffs' only way to stay warm,
11 both at night and during the day. This is where Plaintiffs
12 house all of their necessary equipment for their basic
13 survival and this is the place where they also have the best
14 chance of getting out of this vicious cycle of homelessness,
15 moving from eviction to eviction. So the significant risk
16 of serious, immediate and proximate harm from the eviction
17 that Defendant is pushing forward is really life or death.

18 The third part is that the risk was obvious or
19 known to the municipality, and as you can see from Exhibits
20 2 and 3 of the Complaint, these documents from all of City
21 Council and the eight members who wrote the letter,
22 widespread protests, this case has been all over the news,
23 the meetings and the efforts described in Nicole Perez's
24 declaration. You can see that even people in the City, many
25 people are working on this because they understand the risks

1 of eviction on residents and the need to not deprive the
2 plaintiffs from their interim safety net, that this is an
3 obvious or known risk that Defendant Frey is fully aware of
4 and he obviously understands that being unhoused is a
5 horrific experience, that we don't want this, and yet he is
6 here with this eviction seeking to deprive people of their
7 best chance of getting out of that situation.

8 And the fifth factor of this five-part test for
9 state-created danger is that the municipality's conduct must
10 shock the conscience. To campaign on a promise to end
11 homelessness and then to purport to make good on that
12 process by seeking instead to put unhoused people in more
13 danger, to destroy the best and most successful joint effort
14 that is making unprecedented progress towards giving people
15 the opportunity to help themselves, to help each other, to
16 find housing, to get sober, to put their lives back on
17 track, to do that in the name of public safety and in the
18 name of quote-unquote "ending homelessness," that's
19 unconscionable.

20 And this is perhaps uncomfortable for many of us
21 in the room to think about, but something that's also
22 intimately relevant and fundamentally at issue here is
23 thinking about context and history.

24 This is an Indigenous healing camp. We are on
25 stolen land. Most of the residents of this camp are Native

1 descendants who are dealing with the aftermath of land
2 theft, of inter-generational trauma. There is a reason that
3 houselessness disproportionately affects Indigenous people
4 and that so many people at this camp are Native.

5 And part of this has to do with -- it's shocking
6 that the narrative here is that this camp is dangerous.
7 That is unconscionable and shocking when for centuries,
8 since first contact with colonizers and Indigenous people
9 here, that's been the narrative that settler colonists have
10 used to take this land, is that Native people don't know
11 what's best for themselves.

12 You have declarations from people who spend all
13 their time at this camp who really know this community and
14 they're saying, "This is the safest place I've ever been
15 since I've been unhoused." They're saying this is the thing
16 that is helping people find stability, find housing, enter
17 recovery. They're saying, "We are here. We are doing the
18 best we can and there are no safe or better options." And
19 then you have someone who doesn't live there, who hasn't
20 spent time there, who doesn't go to the meetings to talk
21 about this saying, "You're a danger to yourselves"?

22 That's just -- it's disrespectful to the work
23 that's being done at the camp when you can see across the
24 board numbers are down for drug use. People in the
25 neighborhood are seeing fewer and fewer needles on the

1 ground. People are having tremendous success with bettering
2 their lives and connecting and stopping the harm that's been
3 happening for so long.

4 So, for the State of Minnesota to steal someone's
5 land -- or it was a territory at that time, I suppose -- and
6 then to have its officers and agents, subdivisions, the
7 Mayor of the City of Minneapolis, to go on to tell their
8 family members and descendants that because they don't have
9 land they don't get to feel safe, they don't get to have
10 belongings or privacy or live with their loved ones, that's
11 unconscionable.

12 The fourth claim is a violation of the Eighth
13 Amendment. The Eighth Amendment prohibits the state from
14 punishing an involuntary act or condition if it is the
15 unavoidable consequence of one's status or being, and that
16 is a Ninth Circuit Court of Appeals opinion, the **Coalition**
17 **on Homelessness** case previously cited.

18 And this involuntary question, it speaks to the
19 heart of what you're doing when you're punishing or you're
20 imposing harm on homeless people for sleeping outdoors when
21 they don't have anywhere else to go, for existing during the
22 day with their belongings on public property on the, quote,
23 "false premise" that they had a choice in the matter.
24 That's from that Ninth Circuit case.

25 Do the plaintiffs have a choice? Is the shelter

1 adequate when they can't bring anything more than an armful
2 with them and where they have to leave their community? I
3 think beyond just a place to sleep at night, with that all
4 of the hardships of having to find that anew every morning,
5 people deserve community. And it's totally understandable
6 for Plaintiffs to not feel like they have a choice when they
7 have a place where they're really able to start getting
8 their lives together, or when they're stuck in that crisis
9 response, trauma brain, waking up at 7:00 every morning,
10 getting kicked out of the shelter, having to scramble to
11 find a place to sleep the next night and not knowing where
12 their meals will come from, where their friends are, or how
13 they could possibly stay in touch with anybody who's able to
14 help them get out of that.

15 THE COURT: The one case that applied the Ninth
16 Circuit's decision in **Martin** in the Eighth Circuit, at
17 least, is **Frank vs. City of St. Louis**. How do you respond
18 to the judge's reasoning in that case?

19 MS. KELLEY: I'm unfamiliar with that case off the
20 top of my head, Your Honor. Would you --

21 THE COURT: Certainly. So in that case, the City
22 of St. Louis decided to do something that I understand is at
23 least comparable to what's going on here, which is it
24 decided to remove an encampment from a particular area of
25 the city. It didn't ban or outlaw homelessness altogether,

1 or punish it altogether. It moved it from one place, said
2 it can't occur there, and presumably left it to occur, if at
3 all, other places. And therefore, the court in that case
4 concluded that the Ninth Circuit's reasoning didn't apply,
5 either because *de jure* it wasn't outlawed or *de facto* it
6 wasn't outlawed.

7 MS. KELLEY: I would agree with that reasoning,
8 Your Honor, and I think that's the heart of this request, is
9 we need more time. That the way to evict an encampment is
10 not at gunpoint. It's not under threat of arrest. It is
11 through the ability for people to work together, including
12 residents. Residents have to be a part of this decision and
13 when you're evicting people at gunpoint they're not, but
14 there has been conversations and we've heard from both the
15 memorandum from the City and from organizers and supporters
16 of this camp like Nicole Perez that residents are willing to
17 work with the City and address concerns and to move
18 somewhere as long as that's done so that they can remain a
19 community, they can keep this culture of healing going and
20 not scattered. There's a huge difference between being
21 evicted with nowhere to go and collaboratively agreeing to
22 move somewhere else.

23 The fifth cause of action, quickly, if you're
24 ready for that, is the cause of conversion, and that's,
25 simply put, the plaintiff has a property interest and the

1 defendant converts it.

2 Moving on to the --

3 THE COURT: What do I do with the state
4 constitutional claims? I mean, the Mayor points out,
5 correctly, that they're not covered under 1983, and you
6 agree with that, right? You can't assert a state
7 constitutional claim through 1983.

8 MS. KELLEY: Yes.

9 THE COURT: Okay. Is it -- do you agree that
10 those claims sort of go in -- sort of survive or don't to
11 the same extent as the federal claims?

12 MS. KELLEY: I think for the purpose of
13 preliminary injunctive relief we just -- we're looking at
14 whether at least one of these claims survive. And if you
15 look at the state claims, some of them, the state
16 constitution mirrors exactly the federal constitution and
17 we're just looking at the state claim as a supplement to
18 that and because the precedent is analogous. Looking at the
19 claim of state conversion, for example, I would say that
20 that bears on other factors of the Complaint where a
21 violation of law is at issue.

22 THE COURT: Different, though, common-law claim.

23 MS. KELLEY: Right.

24 THE COURT: Right. And I'm just -- I'm trying, at
25 least -- and I may not be doing a very good job of it, but

1 just asking about the state constitutional claims. Those,
2 you agree, survive --

3 MS. KELLEY: I see what you're saying.

4 THE COURT: -- or don't to the same extent as the
5 federal claims.

6 MS. KELLEY: The federal constitutional claims are
7 the primary basis of those causes of action, and the state
8 constitutional claim is referenced within each -- like,
9 within the same count. So referencing the state
10 constitutional provision in the same count of the Complaint
11 as the corollary federal part -- because the federal cause
12 of action is really what is supported, like you're saying,
13 by the 1983 statute, but the state constitutional claim is
14 another way of looking at it. It's not the basis for the
15 violation of 1983. It is the -- it's sort of the -- you
16 can't have one without the other, and the federal claim
17 supports the federal statute, but the state constitutional
18 claim supports these legal arguments because their case law
19 interprets them functionally identically.

20 THE COURT: Functionally identically.

21 MS. KELLEY: Right. The -- what is it -- the
22 Minnesota Fourth Amendment equivalent is construed in the
23 same manner.

24 THE COURT: And you agree that's true of all of
25 the constitutional provisions that are at issue here.

1 MS. KELLEY: I would not be prepared, Your Honor,
2 to make a blanket statement like that. I would think of it
3 more like a belt-and-suspenders strategy where the primary
4 basis is the federal law claim, but we have this -- state
5 constitutional protections as well.

6 THE COURT: Okay.

7 MS. KELLEY: I'll turn to the third factor. And
8 looking at the four factors of injunctive relief, we've just
9 discussed the various merits of the claims and that it is
10 reasonably likely that at least one of these claims whether
11 brought under the state or federal constitution will prevail
12 and that's sufficient to meet that second factor.

13 The third factor is the balance of equities. And
14 ultimately, the balance of equities is what's the harm by
15 granting this to the parties versus what's the harm by not,
16 and that invites the question: When granting this
17 injunction, what would you be preserving and what would you
18 be putting a stop to, and how does that factor into the
19 interests of both parties.

20 So here we see by granting this injunctive relief
21 you're preserving a chance for widespread, long-term
22 improvements that both parties are interested in seeing.

23 The Mayor tries to take credit for the successes
24 that the camp is responsible for. In the Mayor's memorandum
25 we learned that a hundred and four people -- it's up from

1 the numbers cited in the declarations taken in December -- a
2 hundred and four people have been able to find stable
3 housing. That's huge. That is unprecedented. And if that
4 progress is so laudable, why not allow the camp to keep
5 going? When otherwise in the history of this city has there
6 been such success with getting people into permanent
7 housing? And I would love to hear if the Mayor's attorneys
8 do have an answer to that question, but I think it just
9 hasn't happened.

10 This camp is getting people off the streets, into
11 housing, into recovery, like never before, and that is
12 because it is a cultural place rooted in Indigenous
13 principles, run by people with direct-lived experience. As
14 you see from Nicole's declaration, the people who work here
15 are the people who are approaching this with empathy and
16 with a willingness to work together to find solutions.

17 The balance of equities favors granting this
18 injunction because it's in both parties' interests for this
19 camp to keep going. The Mayor's promise to end
20 homelessness, this camp is actually making that happen in
21 ways that the City alone hasn't been able to do. And I
22 don't want to devalue the hard work of social workers, of
23 housing workers, of City officials and outreach personnel
24 who are really trying to make a difference. And I want to
25 honor that work and name that it is Camp Nenookaasi that is

1 making those workers effective, that this place -- to go and
2 find somebody, to be able to meet with somebody, to have a
3 couple follow-up questions, to come back in a couple of days
4 and find them again is huge, and the camp is making that
5 possible. The success of Camp Nenookaasi is because of
6 Nenookaasi.

7 The fourth factor, the public interest -- and I'll
8 address your questions from earlier, but if I miss anything,
9 Your Honor, please ask me again.

10 And just first off, the City makes light of this
11 in its response, but the protection of constitutional rights
12 is always in the public interest and not just when it's
13 convenient.

14 First and foremost, this lawsuit is in the public
15 interest.

16 And second, something we all care about, public
17 safety. Being unhoused is unsafe. Being unhoused puts you
18 in an incredible vulnerable position. You can look at
19 statistics across the board about overdoses that happen in
20 the unsheltered, unhoused community, about deaths, about
21 violence, about substance use, about trafficking, all of
22 these concerns brought up in the City's memorandum, the
23 Mayor's memorandum.

24 Being unhoused is just dangerous and this camp is
25 allowing people to first and foremost experience a modicum

1 of interim safety. I shudder to think about what would have
2 happened to these a hundred and fifty or so plaintiffs had
3 this camp not existed. Where would they be without
4 Nenookaasi? And the way that they're able to, like, get out
5 of it is important as well, but just first and foremost what
6 it allows them in the meantime.

7 The public safety concerns are not a result of the
8 residents or of the camp. Vulnerable people get preyed on
9 by others, and T-Bone's tragic death that's also referenced
10 thoroughly in the Mayor's memorandum, other instances cited
11 the overdose as you were talking about, or -- there was one
12 overdose, but the -- people are distributing Narcan, they're
13 getting trained in Narcan. They are learning how to watch
14 for signs of that and are saving each other's lives in ways
15 that wouldn't happen on the street. This is a community
16 where people watch out for each other, where they're working
17 together out of an imperfect situation in ways that are
18 demonstrating gains across the board.

19 The vestiges of this violence, which I would say
20 are not -- they're not Plaintiffs causing this harm and
21 violence, systemic poverty, racism, anti-Indigenous
22 oppression. These structural frameworks cause all sorts of
23 harms to the whole community, not just the people that live
24 at Camp Nenookaasi, and because they're all at camp gathered
25 in one place, these problems are more visible. But how many

1 people would be dying of an overdose under an underpass or
2 would be trafficked and nobody would even know that what
3 we're looking at here is a trade-off between are people
4 visibly struggling, but in ways that are meaningfully
5 reducing that hardship and those struggling, or are people
6 struggling invisibly in much greater numbers and to a much
7 greater extent scattered all over the City, and which one is
8 preferable?

9 And from a purely utilitarian perspective, it's
10 more efficient for social and housing workers. It's safer
11 for residents. There is a decline in substance use. There
12 is support for getting out of that situation, but it's just
13 more visible because it's more concentrated. And that does
14 speak to what you were saying earlier about the case that
15 informed the Ninth Circuit opinion and what's discussed by
16 both parties to this case. Nobody is saying this should be
17 the permanent solution, but until there's something better
18 that everyone agrees on, this is the best that we have. And
19 the public interest is in favor of doing what is necessary
20 to minimize suffering and to minimize danger, to minimize
21 violence, to address the root causes of poverty, of
22 colonization of racism.

23 Everyone that we're working with, that everyone
24 is -- my clients are working with, these social workers,
25 these housing workers, representatives of City and County

1 government, they're in support of this, because they know
2 that it is making it easier for meaningful transformative
3 impact to be had, and that's in the public interest. We
4 want to use our tax dollars well. We want social workers to
5 have a meaningful chance at connecting with people and
6 pulling them into recovery and allowing people to take steps
7 for themselves to stabilize their lives. It's in the public
8 interest not to just pull the rug out and deprive the
9 residents of this -- their one best chance at this.

10 I'll just end and then of course if there's
11 questions, but it's in the public interest to remember that
12 people aren't disposable. We shouldn't just hide people
13 away because they're unsightly or because we don't want to
14 contemplate the realities of what we're seeing.

15 Plaintiffs' belongings might be disposable, they
16 might get thrown in the trash tomorrow, but my clients will
17 still be there and they'll be left to pick up the pieces, to
18 start again from nothing like they have many time and time
19 again. They're not worth just abandoning.

20 The care and compassion that camp allows people to
21 provide to each other and the opportunity for people to use
22 Camp to demonstrate their resiliency to really get out of
23 it, it is in the public interest to recognize this is
24 working and we just need a little more time for that to
25 continue to work, for concerns to be addressed through this

1 collaborative process as all parties come together, and for
2 a longer term permanent solution to be found for everyone.
3 But the last thing we need is for camp to be evicted, people
4 to be scattered, and for us to be in the exact same position
5 five months from now when another encampment tries to form
6 and we're right back where we started.

7 THE COURT: Thank you, Ms. Kelley.

8 MS. KELLEY: Thank you, Your Honor.

9 THE COURT: Ms. Enslin?

10 MS. ENSLIN: Good afternoon, Your Honor. Sharda
11 Enslin here, Assistant City Attorney, here today on behalf
12 of Mayor Jacob Frey.

13 The City of Minneapolis and the Defendant Mayor
14 Jacob Frey made a determination to close the encampment
15 located at 2313 13th Avenue South. That is the encampment
16 that is the subject of this lawsuit.

17 Three deaths have occurred at this encampment
18 within the last three months. That includes a fatal drug
19 overdose, the death of a baby, and a homicide of a man who
20 was shot six times in the encampment, and these are just the
21 most egregious examples.

22 There have been more than one hundred 911 calls
23 within the past four months related to this encampment. And
24 that doesn't just include calls made from nearby community
25 members, though the record is certainly rife with those.

1 Calls related to vandalism, to open drug use, to public
2 sexual acts, to hit-and-runs, to stray gunshots, and human
3 trafficking. And I believe Your Honor asked Plaintiffs'
4 counsel if they dispute early on in their argument those
5 facts that the Mayor has put forward, and the answer was no.
6 That's because this is what is occurring at that encampment.

7 And this is just related -- those are just related
8 to calls made from community members outside of the
9 encampment. What we haven't even really discussed yet is
10 the fact that dozens and dozens of these 911 calls
11 originated from within the encampment itself, from
12 individuals within the encampment who fear for their safety
13 or the safety of others that are in the encampment. Drug
14 overdoses, unresponsive individuals, assaults, gunshots,
15 persons in crisis. These are the kind of calls that the
16 Minneapolis Police Department and the Minneapolis Fire
17 Department are getting on nearly a daily basis related to
18 this encampment.

19 This encampment is dangerous. It is a threat to
20 those that are staying within it and it is a threat to the
21 surrounding community, and that is why the Mayor in
22 connection with the City have made a determination that this
23 encampment must now be closed.

24 And as outlined in the City's memorandum in detail
25 and as set forth in the City's operational guidelines which

1 were included as an exhibit to the declaration of the
2 Director of Regulatory Services, the City does not take
3 closures of encampments lightly. It is the City's goal,
4 it's the City's mission, to do these encampment closures in
5 a way that treats unsheltered individuals with dignity, that
6 connects people to services and to shelter, and that treats
7 personal belongings with respect. And this mission has been
8 exemplified in the way that the City and the Mayor have
9 addressed the closure of this particular encampment.

10 Parties at this encampment arrived on the
11 encampment on August 24th, 2023. They broke through a
12 fence, cut through a fence that was closed off securing the
13 property, and within hours 40 individuals had climbed
14 through the broken fence, were trespassing on secured City
15 property, and set up tents.

16 Did the City or the Mayor send police officers to
17 arrest those individuals? Did the City or the Mayor cite
18 those individuals for destruction of property? No. Instead
19 what the City did and what the Mayor did was send the
20 Homeless Resource Team that very day to that site to start
21 connecting people with services.

22 That Homeless Resource Team has been out there at
23 least 15 more times since then connecting people with
24 services. And I will tell you, Your Honor, they're out
25 there right now. They are out there right now connecting

1 people to services, offering storage, helping people to move
2 off of the street, to move away from sleeping outside on the
3 ground, into shelter, to take their belongings from being
4 left inside a tent to a secure, unlimited storage facility
5 where they can access those at any time.

6 They are providing transportation for people to
7 sites that they would like to go, to the storage facility.
8 They're bringing storage bins to the encampment so that
9 individuals can pack up their goods and that the staff there
10 can help with that. That's occurring right now.

11 When the City saw individuals -- when the Mayor
12 saw individuals start to accumulate goods and property at
13 this encampment over the course of the last few months, did
14 they immediately go to the encampment and start throwing
15 things away even though as a matter of law those individuals
16 were in fact trespassing? No. Instead, they not only --
17 the Mayor not only instructed his Homeless Response Team to
18 go out to provide storage options to connect these
19 individuals to services, but the Mayor brought with his team
20 a host of service providers that go to Hennepin County, that
21 are independent service providers, that work together with
22 these human -- or the City Resource Team in order to make
23 these connections for individuals to shelter.

24 The idea that the City has not engaged -- the
25 Mayor has not engaged in discussions, in negotiations, in

1 giving the individuals at the encampment an opportunity to
2 be heard, that's just not accurate. It's just not what has
3 happened in this case and that's laid out I think pretty
4 clearly in the City's factual background.

5 The City staff have had multiple meetings,
6 multiple sit-downs, they've met with encampment leaders, all
7 with the purpose of trying to find some kind of resolution
8 to connect those in the encampment with shelter, with
9 housing, with services, with property storage. This wasn't
10 something that happened one time, that happened a week
11 before the closure. This has been happening for months.
12 They have been out there weekly since August.

13 In addition, the City has made multiple attempts
14 and the Mayor has in connection with that made the same
15 attempts to find other opportunities for providing those in
16 the encampment with the type of potentially housing
17 situations they're looking for. As we outlined in our
18 memorandum, the City actually met with builders, with
19 different resource groups, to try to find out was it
20 possible, could we have a building, could there be a center
21 where people could go, where they could stay. All of these
22 avenues were exhausted prior to getting to the point that
23 we're at.

24 It is undisputed that the City has made extensive
25 efforts over the last four months to try to connect these

1 individuals with housing, to try to compromise, to try to
2 negotiate, and to try to facilitate a situation in which
3 individuals can be connected to resources and also not be
4 sleeping on the ground on a City lot.

5 I want to talk about -- I want to start by
6 focusing with regards to the legality of the preliminary
7 injunction and the factors and the tests that we're looking
8 at here.

9 The first thing I want to do is, I want to talk
10 about the irreparable harm. So, Plaintiffs' counsel had
11 said that they look towards the current class action lawsuit
12 that is going on right now in Minneapolis, the **Berry vs.**
13 **Hennepin County and City of Minneapolis** lawsuit. I am lead
14 counsel on that lawsuit for the City of Minneapolis. I am
15 intimately familiar with it.

16 And what I can tell you is there was a similar
17 motion for a temporary restraining order made at the
18 inception of that lawsuit in 2020. And if we're looking to
19 the way that was handled, particularly as Plaintiffs'
20 counsel said, by Judge Wright, that motion was denied. And
21 in fact, that motion was denied exclusively on the
22 irreparable harm basis.

23 Because what Judge Wright held is that it is not
24 enough to have harm. It is not enough to allege that there
25 is some kind of damages. In order to issue -- to warrant

1 the issuance of a temporary restraining order, the harm must
2 be irreparable. It must be something that cannot be
3 adequately addressed through monetary damages. It's
4 something that cannot be speculative and it must be certain
5 and concrete.

6 You asked Plaintiffs' counsel to provide you with
7 an example of a case that is similar to what they're asking
8 for here where the harm is speculative, but also proved to
9 be enough to warrant the granting of a temporary restraining
10 order, and the plaintiffs' counsel could not cite such a
11 case. They deferred and referred you to the declarations of
12 their clients.

13 I can refer you to such a case. It's the **Berry**
14 case. That determination was made by Judge Wright, that
15 that isn't enough, that the harm has to be irreparable in
16 nature and it has to be something that cannot be solved
17 through monetary damages, and that just doesn't exist here.

18 And, Your Honor, please do stop me with questions
19 as I go as well. I want to talk a little bit about the
20 balance of the harms here as well too.

21 We have to look at the reality of the situation
22 that we're in, which is, we have an encampment that is
23 massively unsafe in which people are dying and in which
24 calls come in on almost a daily basis from a community that
25 is being terrorized by unsafe, hazardous and criminal

1 activity, and this is supported by leaders from the
2 Metropolitan Urban Indian Directors Community. In fact,
3 submitted with the City's submissions was a letter from that
4 group signed on by every member of that community, saying
5 that this encampment must close. It's not safe. It is
6 hazardous. There are conditions that are not safe for human
7 habitation there, and it's important that we look at that
8 and address the severity of that when we're considering the
9 balancing of the harms.

10 Plaintiffs' counsel has represented that their
11 clients will experience harm if they are forced to leave the
12 camp, if they are forced to scatter, if they are required to
13 move to shelter instead of staying at the camp.

14 The City is not requiring them -- the Mayor is not
15 requiring them to scatter. The Mayor is not requiring them
16 to lose this community. The closure of the encampment does
17 not mandate that they cannot be in touch with each other,
18 that they cannot meet and regroup every day if they so
19 choose. They simply cannot sleep outside in tents on City
20 property. It is not safe and it is not lawful. And that
21 when balanced cannot compete with the drastic harm that is
22 being faced by not only those people that are living at the
23 encampment, but the community surrounding the encampment as
24 well.

25 The public interest in closing the encampment is

1 also extremely high. Again, I feel like a broken record,
2 but, Your Honor, the truly dire, dangerous situation creates
3 a grave risk for the public. The Mayor cannot stand by
4 while members of the community are dying at this homeless
5 encampment, while people are being shot and killed, while
6 people are overdosing, while people within the encampment
7 are calling for the police to come and help with individuals
8 who are unconscious, who are unresponsive. That is not in
9 the public interest.

10 And I agree it is absolutely in the public
11 interest to have unhoused individuals to have a path for
12 permanent, stable housing. The encampments are not the way
13 forward for that. The idea that encampments are the best
14 way or, as Plaintiffs insinuate, the only way for a stable,
15 reliable path to housing is absolutely inconsistent with the
16 history of how unhoused individuals transition to stable
17 housing for decades in this city.

18 Prior to 2020, large-scale encampments in
19 Minneapolis were not really a thing. And it is not the case
20 that prior to 2020 unhoused individuals were without any
21 recourse, were without any avenue to obtain stable housing.
22 That's because the more effective, the safer for both the
23 individual and the community avenue for that is through the
24 shelter system, is through the temporary housing system.

25 And this idea that individuals won't be able to be

1 reached, that outreach workers won't be able to find folks
2 if they leave the encampment and go to a shelter is, again,
3 inconsistent with decades of experience of how outreach work
4 and social services reach the unhoused community. It is not
5 necessary for there to be an encampment for that
6 communication and for those relationships to foster.

7 I'd like to talk a little bit about the likelihood
8 of success on the merits for these claims. I'd like to
9 first talk about the Fourth Amendment claim.

10 Again, imperative to this is the underlying
11 principle that those living at the encampment at 2313 13th
12 Avenue South are in fact trespassing. And again, I would
13 direct Your Honor to Judge Wright's ruling in the **Berry**
14 lawsuit, which was that there is no right to privacy to live
15 on government land. It does not exist. We have cited that
16 in her ruling on that in our brief and Plaintiffs do not
17 argue the contrary. So what we have here are Plaintiffs
18 attempting to assert a privacy right that doesn't exist.
19 There is no right here to occupy government land, to set up
20 a structure and to have that expectation of privacy. It
21 simply isn't the case. It's inconsistent with the law.

22 As far as the Eighth Amendment claim goes --

23 THE COURT: Can I ask a couple --

24 MS. ENSLIN: Yes, Your Honor.

25 THE COURT: -- questions? I just want to be sure

1 I understand the City's position. I didn't see it in the
2 brief and I want to be sure that I wouldn't be thinking
3 about it incorrectly.

4 It's City-owned property, correct?

5 MS. ENSLIN: The City does own the property.

6 THE COURT: Does the City have the authority to
7 consent to have its own officers go in and undertake to
8 remove the camp? It seems to me it does.

9 MS. ENSLIN: It does, Your Honor.

10 THE COURT: And consent, as we all know, is an
11 exception to the warrant requirement, correct?

12 MS. ENSLIN: Correct.

13 THE COURT: Okay. And though -- I understand the
14 argument's about the right of privacy, but the seizure of a
15 good, a thing, counts as a Fourth Amendment seizure
16 regardless of whether there's a privacy interest at stake,
17 right?

18 MS. ENSLIN: Correct.

19 THE COURT: But there's a post-deprivation remedy
20 for that, or at least as I understand it you're telling me
21 there's sort of a pre-deprivation opportunity and a
22 post-deprivation remedy, right?

23 MS. ENSLIN: Correct.

24 THE COURT: Okay. Then I understand it. Thank
25 you.

1 MS. ENSLIN: Yes. And just to clarify what those
2 pre-deprivation and post-deprivation remedies are, the
3 pre-deprivation remedy is the individuals are given
4 extensive notice.

5 THE COURT: And the City will store your stuff.

6 MS. ENSLIN: And the City will store your things
7 through a contract with the Downtown Improvement District.
8 They will transport your goods there. They will provide you
9 with a storage bin. Yes, you do need to check in with the
10 Downtown Improvement District every two weeks via phone
11 call, via in person, to assure that you are still interested
12 in keeping the belongings.

13 And this isn't in the brief, but I will tell Your
14 Honor this has been my experience litigating encampment
15 cases for years now. The City historically prior to the
16 contract with DID, the City did actually itself, the City's
17 Public Works Department, stored encampment residents' goods
18 for a period of time in 2020. In fact, the City stored
19 goods of over a hundred different encampment residents in
20 2020. They brought bins to encampment sites, they picked up
21 residents' goods, and they brought them to a Public Works
22 facility, over a hundred different individuals' belongings.
23 Less than three of those bins were ever claimed.

24 So there is an interest on behalf -- I say that to
25 explain the position of DID with requiring some kind of

1 check-in and continued interest in the belongings that have
2 been stored.

3 Again, too, the post-deprivation, the City has a
4 claims process. The City is -- will take -- there is a
5 claims committee, there is a claims process that is outlined
6 in detail on the City's website. If you believe you have
7 lost property as a result of the City's actions, you can
8 submit a claim and the City will evaluate the claim, they
9 will look at your information and determine if that actually
10 did happen. And if it did, the City will address the claim.
11 That's the post-deprivation remedy and that exists and
12 that's existed for years.

13 But in addition, here we really see that
14 pre-deprivation remedy which again provides weeks of notice.
15 And there have been issues in the past with encampment
16 closures where parties just have not agreed what is the
17 right way to do it, how much notice do you need to provide,
18 is three days enough, is six days enough, is it important to
19 tell the date. And here the City has conducted this
20 particular encampment closure in a way that's consistent
21 with every activist, every organizer, every encampment
22 leader that it has come in contact with regarding notice,
23 regarding the amount of time, regarding the storage made
24 available and regarding the opportunity for people to leave
25 with their belongings.

1 And again, to touch on the irreparable harm piece
2 as it relates specifically to belongings, again, if you have
3 notice and you have the opportunity to store your things, at
4 some point this turns over into a situation in which
5 individuals who actively choose to ignore the notice, to not
6 remove their goods, to not take up storage, become the
7 architects of their own irreparable harm, and that simply
8 cannot be the basis for a TRO. When all of those
9 opportunities are provided and the individuals make a
10 determination that they don't want to do that, it's simply
11 illogical that then they could turn around and say, "I
12 didn't take storage, I didn't remove my things, even though
13 I had a month's notice and now I've been irreparably
14 harmed." At some point there has to be a level of
15 rationality there.

16 So before I move on to talk about the Eighth
17 Amendment claim, was there anything related to Fourth
18 Amendment seizures that I could clarify for Your Honor?

19 THE COURT: No. Thank you.

20 MS. ENSLIN: Okay. I do want to talk about the
21 validity and the likelihood of success on the merits on the
22 Eighth Amendment claim, because it is extremely important
23 and it is very distinguishable, the case at hand from the
24 cases that are relied on in support of this claim by the
25 plaintiffs.

1 The absolute most important piece of the -- the
2 touchstone of the cases, **Martin v. Boise**, is that you cannot
3 criminalize homelessness. So in that case there was a city
4 ordinance that allowed criminal sanctions to be imposed on
5 anyone sleeping outdoors. That is simply not the case here
6 and that is highly distinguishable. There are no criminal
7 penalties in the City of Minneapolis for simply being
8 unhoused. That doesn't exist.

9 THE COURT: An ordinance prohibiting it exists,
10 but you're saying it's not criminal.

11 MS. ENSLIN: It's not criminal, correct. And in
12 order for it to reach that Eighth Amendment standard, in
13 order for it to be comparable to **Martin v. Boise**, it has to
14 be criminal. So **Martin v. Boise** is simply irrelevant and
15 certainly not instructive to the situation that we have
16 here.

17 And furthermore, we've seen the City actively and
18 the Mayor actively step aside from taking criminal action
19 full stop on these individuals.

20 The State of Minnesota has a law against
21 trespassing. That does not -- it's not particular to
22 whether or not you are a housed person or you are an
23 unhoused person. Nonetheless, the Mayor and the City have
24 not enforced that statute against these individuals that
25 have been living at this encampment. They would be proper

1 under color of law to have done so on August 24th, 2023, the
2 very first day that those individuals cut open that fence
3 and entered the City's property. The City and the Mayor
4 could have directed law enforcement to cite and arrest
5 individuals. They didn't, because, again, that's not what's
6 happening here. Unlike **Martin v. Boise**, homelessness is not
7 being criminalized here.

8 To the contrary, the efforts here to close this
9 encampment are to preserve the safety of those individuals
10 that are living within it, because the criminal activity
11 abounds. And as Plaintiffs' counsel said, living unhoused
12 puts individuals at a higher risk of being exposed, of being
13 preyed upon. And unfortunately, what we know happens is
14 when you put a vulnerable population together in a group
15 outside without heat, without running water, without
16 plumbing, and you put these vulnerable people together in
17 the elements, they are preyed upon, and that is absolutely
18 the case that is happening in this encampment. Those
19 individuals are not safe living there. In fact, they're in
20 a position where they're being exposed by not seeking
21 shelter, by not connecting with services.

22 And again, it's important to note that the
23 individuals that remain at the site are making a conscious
24 decision to do so. Every individual that is at that
25 encampment has been contacted, has been offered shelter

1 services. That is in the City's declaration. Those
2 individuals choose not to go.

3 The City understands that there may be situations
4 about a shelter that individuals might not like. While
5 there are ample varieties of shelters, it's true there are
6 some shelters that are not co-ed that might require a couple
7 to split up and stay separately. I will say that there are
8 always family shelters available for families to stay at 100
9 percent of the time in the City of Minneapolis. There may
10 not be a shelter that will take your dog, that's correct,
11 but do you know what? The Minneapolis Regulatory Services
12 Department will arrange for your animal to be kept safe
13 while you are at a shelter. That is something that they do.
14 So there are ways around a lot of these things, and at the
15 end of the day they might not be anyone's first choice. The
16 City acknowledges that, but that doesn't mean that the other
17 option, the more acceptable option, is to sleep outside
18 trespassing on City property.

19 One thing I want to touch briefly on that we
20 haven't talked about just yet, Your Honor, too is what
21 the -- and again, this goes to the public interest -- what
22 the encampment and its existence is doing to the development
23 of that particular property.

24 So currently, the City lot in which the 2313 13th
25 Avenue South encampment, the encampment that is the subject

1 of this lawsuit, that encampment exists on a piece of
2 property that is set to be sold to the Indigenous Peoples
3 Task Force. The Indigenous Peoples Task Force is going to
4 convert that property into a wellness and community center.
5 In order to do so, they need to start preparing the
6 property. The property is set to be sold in February, less
7 than a month from now. The Indigenous Peoples Task Force
8 has represented to the City that without adequate time to
9 prepare the property in advance of the sale, it's going to
10 delay the building of the community center. It's going to
11 delay the services that the community center would provide.
12 That is absolutely in the public interest. By allowing the
13 encampment to exist, we're not only maintaining a safe -- or
14 maintaining an unsafe, dangerous situation, but we're
15 preventing the development of a safe and helpful community
16 center.

17 So I think we already touched a little bit on the
18 procedural due process piece as well, Your Honor, the
19 availability of an opportunity to be heard prior to the
20 closure and an opportunity to address the plaintiffs'
21 individual belongings and the eventual -- what would happen
22 to those belongings after the closure.

23 Interestingly, what Plaintiffs really want is a
24 policy change. They want to be able to stay at the
25 encampment for as long as they want. It's not a matter of

1 whether or not there is adequate process. I don't think
2 there is any process that would satisfy what the plaintiffs
3 are looking for. The only process that would be acceptable
4 to them based on what I've heard today and what's in the
5 briefing is an agreement that they don't have to leave, and
6 that's simply a policy decision. That's not a legal
7 decision here.

8 The City of Minneapolis has made a determination
9 with its elected officials and its appointed directors that
10 this encampment needs to close. They are given weeks of
11 notice, they are given opportunity for storage, they are
12 given the opportunity for transportation, and they are
13 connected to shelter services. This is unequivocally
14 adequate process for Plaintiffs to make a determination as
15 to how they want to move forward. And if they choose not to
16 take up those options, not to take up storage, to leave
17 their personal belongings behind, again, at some point there
18 needs to be some ownership over those decisions.

19 I realize I've bounced around quite a bit, and
20 candidly, Your Honor, I haven't slept in 36 hours, so if you
21 have other questions or if there's areas that I have missed
22 that you would like to direct me towards, I would be happy
23 to answer further. I know we've been going for almost an
24 hour and a half and I'm very cognizant of Your Honor's time
25 as well.

1 THE COURT: I do not have other questions,
2 Ms. Enslin. My primary questions revolved around the Fourth
3 Amendment claim and the Mayor's position with respect to
4 that. I apologize. So I do not have other questions.

5 MS. ENSLIN: All right. Well, then I will sit
6 down at this point and I thank you for your time, Your
7 Honor.

8 THE COURT: Thank you. Ms. Kelley?

9 MS. KELLEY: Thank you, Your Honor. I'll try to
10 be concise with my rebuttal.

11 The crux of what we're arguing about here seems to
12 be the difference between how things are imagined when
13 people design them from the position of government, from the
14 Mayor's office, how things look in the dream world and how
15 they look to the people that are trying to access these
16 services. And there's a lot of people working really hard,
17 there's a lot of compassion and good intentions and effort
18 from all sides of this problem, but the solution that
19 Defendant Frey is proposing disregards how people know it to
20 work out in reality. And people are at Camp Nenookaasi
21 because that's the best they can do, because it is better to
22 be there than to be out on the streets or in a shelter,
23 because those options -- the shelter options don't work the
24 way that maybe they've been designed, or they're not enough,
25 or they're not the same.

1 If you look at the declarations from plaintiff
2 Sagataw on page 25, or declarant Crabtree, page -- paragraph
3 7 and subsequent, camp saves people from trafficking. The
4 epidemic of Missing and Murdered Indigenous Women and
5 two-spirits is very real, it is very dangerous, and it
6 impacts people. In particular, unhoused populations are
7 very vulnerable to that.

8 Camp is a place where people go to find safety.
9 And while dangerous things happen at camp as they happen
10 everywhere, the declarations are clear from the people that
11 have spent time at camp, it is a lot safer there than it is
12 anywhere else. Again, it is just the preference of the
13 Mayor to have horrible things happen in a scattered way
14 where it's less visible than to have people actually
15 improving things imperfectly and with setbacks and with bad
16 things still happening, but at a much reduced number in one
17 concentrate location. People are getting help because they
18 can be found.

19 And it's clear from City Council meetings, from
20 the letter of the eight City Council members, Exhibit 2,
21 from the declarations, that that's the reality. You might
22 think, oh, you go find somebody and follow up with them, but
23 when housing and social workers and representatives and
24 nonprofits and all of these budget-constrained entities have
25 employees that are using staff time to call six or seven

1 different places, to go traipse around under bridges, that's
2 the time that they could be spending at Nenookaasi meeting
3 with people rather than trying to find them, actually
4 helping them.

5 There's also -- I just wanted to correct the
6 difference in the **Berry** case, Your Honor. I think it's a
7 bit disingenuous to cite to that dismissal of the TRO and
8 call that analogous fact patterns or an analogous legal case
9 when in fact in the **ACLU** case, first and foremost, the
10 temporary restraining order is a highly fact-specific
11 inquiry.

12 And second of all, the basis for denying that TRO
13 was largely because the plaintiffs weren't, as Counsel said,
14 about to suffer irreparable harm, but in that case it was
15 because they had found stable housing that allowed them to
16 liaise with their attorneys to bring this lawsuit.

17 And here the plaintiffs that we have are --
18 Nenookaasi is the only place they have. If this eviction
19 goes through, I do not know how I will find them.

20 Judge Wright's opinion in the temporary
21 restraining order relied on this irreparable harm factor,
22 but the facts were different. Those plaintiffs were in
23 transitional housing that wasn't an encampment.

24 And just to speak on the merits of the claims in
25 that **ACLU** case, the **Berry** case, we looked at that case and

1 we did recognize Judge Wright's opinions on the Fourth
2 Amendment privacy, and that's why we eliminated that count
3 and focused on seizure as our Count One of our Complaint,
4 not the privacy concerns, but that it is the taking and the
5 destruction of the belongings and not necessarily the
6 privacy interest in law enforcement going through people's
7 tents. That was in recognition of Judge Wright's opinion
8 and in order to maintain in compliance with the precedent in
9 this circuit.

10 And I'll also note that that case is still going.
11 It's awaiting further pretrial decisions, but to the extent
12 that the claims are the same, the claims are still going.
13 They've survived motions to dismiss, they're at the summary
14 judgment stage, and have made it that far. The question at
15 the TRO stage was the imminency, and like I said, the facts
16 are different.

17 The other thing I wanted to note that felt too
18 disingenuous not to correct was just that it's not a
19 conscious decision, it's not a choice, for my clients to be
20 at camp. And my client Cheryl Sagataw, for example, she's
21 been trying to get housing since August. She feels like
22 she's on the precipice of it, she's making real progress,
23 but it's been the stability of camp that has allowed her to
24 maintain that relationship with that housing. We're here to
25 make that happen. It's not as though she hasn't been trying

1 or she could be somewhere else, but just chooses to be at
2 camp.

3 And DeAnthony is another example of that. You see
4 in DeAnthony's declaration that he's been at camp for a
5 month and he's already been able to access and take
6 advantage of more services in that one month than he did in
7 a year living at the Tiny Homes, which is another shelter
8 alternative.

9 So it's just disingenuous and it's not fair to our
10 clients to say that this is a choice for them when if they
11 had somewhere safer to be they'd be there. If they had a
12 different alternative, they would use it. It's again the
13 difference between what happens in practice and what happens
14 in reality.

15 And you can also see this whole -- the offer of
16 keeping your stuff downtown in the City. People have these
17 belongings because they need access to them. Think about
18 how many items you or I or any of us use on a daily basis,
19 that to travel all the way downtown every time you want to
20 use your reading glasses. It just -- life becomes
21 impossible without access to the day-to-day things that make
22 it possible for people, and it's completely unreasonable to
23 ask people to store everything downtown when they don't have
24 phones, they don't have cars. They don't know where they're
25 going to sleep at the end of the night when they're not at a

1 place like Nenookaasi. So the storage is just impractical.
2 And that I think is evidenced by the fact that as the Mayor
3 says in his memo, nobody's using it.

4 Another thing just to note is how else can you
5 explain that the camp that peaked at around 180 residents
6 has resulted in 104 people finding housing. That's
7 unprecedented. If this camp is allowed to keep going, it'll
8 keep shrinking, because what people are doing is working and
9 that matters.

10 We look at the housing workers, we listen to City
11 Council, because City Council, they're the ones that have
12 been holding these meetings, have been listening to
13 residents. And again, we're certainly not discrediting the
14 people within different departments of levels of government
15 in the City and the County that are really trying to work on
16 this and are really listening, because what's happening is
17 working. A hundred and four people out of a camp that
18 peaked at 180, finding permanent housing is huge.

19 Just briefly on the Eighth Amendment. To say that
20 they're not going to be punished because there's no
21 ordinance is -- it's just also incorrect when they're going
22 to be arrested if they don't leave and that's punishment,
23 let alone the fact that the harm that's happening through
24 the seizure and destruction of all their stuff. It's
25 negative imposed consequences by the government, including

1 arrest, including criminal consequences for existing when
2 they have nowhere else to go. That's the violation of the
3 Eighth Amendment. And to try to find a factual distinction
4 whether or not there's an ordinance just doesn't pan out
5 with the law.

6 All we're asking is for Your Honor to give the
7 camp more time. We're not asking for the camp to be held
8 open forever. My clients don't want to live at Camp
9 Nenookaasi forever. They just don't want to be homeless
10 forever. And they want a place to stay at night where they
11 can wake up and know they can come back at the end of the
12 day. They want a place to be warm during the day where they
13 can transition into housing arrangements that the City finds
14 more palatable, where they can support each other in doing
15 the work that they need to do to get themselves back on the
16 right track.

17 They all say it's working and Your Honor has read
18 the declarations carefully. I thank you for that, because I
19 think that the people who spend the most time there are the
20 people who best understand the reality of what's going on.
21 They're just asking for more time and they're just asking
22 for the opportunity to address the problems that we all care
23 about. We're all coming here because we care about some of
24 the same things and the people who are experiencing it are
25 the people who know best what's working.

1 Thank you.

2 THE COURT: Thank you, Ms. Kelley.

3 Okay. We have been here for roughly an hour and a
4 half and what I'd like to do at this point is take about a
5 ten- or 15-minute recess and I will return following the
6 conclusion of that recess and announce a decision from the
7 bench. So if everyone will indulge me that time, I would
8 appreciate it and we'll return, as I say, in approximately
9 ten or 15 minutes.

10 (Recess taken at 3:38 p.m.)

11 * * * *

12 (3:53 p.m.)

13 IN OPEN COURT

14 THE COURT: All right. Please be seated,
15 everyone.

16 I appreciate the speed and thoroughness with which
17 the parties have briefed these issues and I commend the
18 lawyers for their work. This is one of those cases that
19 required unusually urgent attention and as a result very
20 likely -- well, we've heard -- very long hours for the
21 lawyers, and to operate on those conditions is quite
22 difficult and stressful, but it's of vital importance given
23 the significance and nature of the issue with which we are
24 dealing here today.

25 As I said, I will announce the decision from the

1 bench here today. What I am about to say as it is recorded
2 in the transcript of these proceedings will be the only
3 place in which the rationale will be recorded. There will
4 not be a separate memorandum, in other words, filed on the
5 docket, only an order.

6 To state the obvious, the homelessness problem in
7 Minneapolis as in many other metropolitan areas in the
8 United States poses substantial societal challenges and
9 harms.

10 The homeless suffer harms resulting not merely
11 from being homeless, but also occasionally from government
12 actions and inaction, including actions intended to address
13 the issue. The public suffers harm too and the record shows
14 the presence of such harms here in the form of criminal
15 activities, harms to adjacent neighborhoods, blight, and the
16 hindrance of property development.

17 In our constitutional structure, how best to
18 balance these societal harms through policy decisions is
19 left in the first instance to the political branches, and
20 here that's the Mayor and the City, not to courts.

21 So, to summarize, I find that Plaintiffs have not
22 shown in this case that the policy choices Mayor Frey has
23 made to address these issues with respect to this encampment
24 are unconstitutional, unlawful in some other respect, or
25 create harms that are so one-sided as to justify enjoining

1 his decision to clear the encampment. For these reasons I
2 will deny the motion for a preliminary injunction.

3 A preliminary injunction is an extraordinary
4 remedy. The Eighth Circuit's familiar **Dataphase** decision
5 describes the list of considerations applied to decide
6 whether to grant a preliminary injunction. These include
7 the likelihood of the movant's success on the merits, the
8 threat of irreparable harm to the movant in the absence of
9 relief, the balance between that harm and the harm that the
10 relief would cause to the other litigants, and finally the
11 public interest.

12 The core question is whether the equities so favor
13 the movant that justice requires the court to intervene to
14 preserve the status quo until the merits are determined.

15 The burden of establishing the four factors lies
16 with the parties seeking injunctive relief here, the
17 plaintiffs. While no single factor is determinative, the
18 probability-of-success-on-the-merits factor is the most
19 significant. Although this factor uses the term
20 "probability," the movant need not show a greater than 50
21 percent likelihood of success. The absence of a likelihood
22 of success on the merits strongly suggests that preliminary
23 injunctive relief should be denied. Here, I conclude that
24 Plaintiffs are not likely to prevail on the merits of any
25 one of their claims.

1 I begin with the Fourth Amendment claim, and I
2 should make clear that when I discuss the federal
3 constitutional claims I am also intending to encompass
4 within that discussion the analogous state constitutional
5 theory.

6 The Fourth Amendment protects the right of the
7 people to be secure in their persons, houses, papers and
8 effects against unreasonable searches and seizures. The
9 seizure occurs when law enforcement meaningfully interferes
10 with an individual's possessory interests in property.
11 Reasonableness is the ultimate standard under the Fourth
12 Amendment and the reasonableness determination must reflect
13 a careful balancing of governmental and private interests.
14 That is from the Supreme Court's decision in the **Soldal vs.**
15 **Cook County** case, 506 U.S. 56, at 62 to 63 and 71. Here,
16 the seizure or seizures Plaintiffs anticipate are not likely
17 to be unreasonable in the relevant sense.

18 First, without intending at all to understate the
19 challenges they face, Plaintiffs have been given substantial
20 and reasonable notice of the City's intent to remove them
21 from the property and the City has given Plaintiffs ample
22 time and a means to store any personal property they wish to
23 preserve from damage or destruction as part of the removal.

24 Plaintiffs have identified no good reason why they
25 could not take advantage of the option the City has

1 provided, certainly no compelling reason why they could not
2 take advantage of that option. In other words, Plaintiffs
3 have it within their own ability to prevent the seizure of
4 their property.

5 Second, the reasons the City has identified to
6 justify the seizure are more than reasonable. The
7 encampment has been the site of an infant's death, an
8 adult's drug overdose death, and homicide. There have been
9 reports of human trafficking occurring from the encampment
10 along with reports of other criminal activity and there have
11 been more than one hundred 911 calls to the encampment.

12 Third, the property is owned by the City, and just
13 as any property owner may consent to the entry of law
14 enforcement for purposes of removing a trespasser or
15 trespassers, the City may consent here.

16 Fourth and finally, the City has identified
17 numerous sensible reasons justifying the decision to treat
18 items left behind as abandoned and destroy them.

19 With respect to Plaintiffs' procedural due process
20 claim, as for this aspect of the Due Process Clause,
21 standard analysis proceeds in two steps. I am to first ask
22 whether there exists a liberty or property interest of which
23 a person has been deprived or is to be deprived, and if so,
24 whether the procedures followed by the state were
25 constitutionally sufficient.

1 Regarding that second aspect, the Supreme Court
2 directs that to determine what procedural protection a
3 particular situation demands, I am to look to three factors.

4 First, the private interest that will be affected
5 by the official action.

6 Second, the risk of an erroneous deprivation of
7 such interest through the procedures used, and the probative
8 value, if any, of additional or substitute procedural
9 safeguards.

10 And third, the government's interest, including
11 the function involved, and the fiscal and administrative
12 burdens that the additional or substitute procedural
13 requirements would entail.

14 Here, Plaintiffs have received notice of the
15 City's intent to clear the encampment. Owing to extensions
16 given by the City, the notice has been significant, running
17 to roughly 28 days, if you include extensions, which I find
18 it reasonable to do.

19 The persons residing within the camp have been
20 given additional process, again in the sense that the City
21 has provided a means for them to have any valuables or other
22 belongings placed in storage at no cost to the individuals.
23 The risk of an erroneous deprivation thus depends largely on
24 a resident's decision not to take advantage of this option.

25 Importantly, as I understand Plaintiffs' brief and

1 argument, the additional or substitute safeguards they seek
2 are not really procedural, but political. Plaintiffs ask
3 for more time with Mayor Frey and perhaps other elected
4 officials to try to change their minds. That is a fair
5 request, but I do not understand this type of request to
6 participate in additional political process to be the sort
7 of procedural safeguard the Due Process Clause generally
8 contemplates.

9 Finally, the government's interest here is
10 substantial given the encampment's unlawful nature, the
11 incidents and activities that have occurred there, the
12 threat to public safety the camp poses, and the City's
13 imminent plans to develop the space.

14 With respect to Plaintiffs' substantive due
15 process claim, the State owes a duty to protect individuals
16 if the State created the danger to which the individuals are
17 subjected. To succeed on a state-created danger theory of
18 liability, the plaintiff must prove:

19 First, that she was a member of a limited
20 precisely definable group;

21 Second, that the municipality's conduct put her at
22 a significant risk of serious, immediate, and proximate
23 harm;

24 Third, that the risk was obvious or known to the
25 municipality;

1 Fourth, that the municipality acted recklessly in
2 in conscious disregard of the risk; and

3 Fifth, that in total the municipality's conduct
4 shocks the conscience.

5 Actionable claims that satisfy the fifth factor
6 involve abuse of power so brutal and offensive that it does
7 not comport with traditional ideas of fair play and decency.
8 Mere negligence or even gross negligence do not satisfy this
9 requirement. Instead, a state-created danger claim usually
10 requires proof of intent to harm, though proof of deliberate
11 indifference may also suffice. To show deliberate
12 indifference, an official must be aware of facts from which
13 the inference could be drawn that a substantial risk of
14 serious harm exists, and he must also draw the inference.

15 Plaintiffs, I find, are not likely to be able to
16 show the second through fifth elements.

17 The claim as I understand it is that the
18 plaintiffs are at risk of harm through the dispossession of
19 their property, being forced to live in the cold in a
20 Minnesota winter, and the risks that certain individuals
21 will face a relapse of underlying health conditions through
22 the loss of stability the camp provides, and by those health
23 conditions I mean health conditions including drug and
24 alcohol dependency, mental health conditions and the like.

25 The City's conduct did not and does not create

1 these risks. Again, the City has given Plaintiffs notice
2 and options to safeguard their belongings. The City is not
3 forcing Plaintiffs to reside outdoors. Plaintiffs reside
4 outdoors today and the City is telling them they need to
5 reside somewhere else, perhaps in another outdoor location,
6 perhaps in a shelter.

7 Regardless, the City's conduct does not shock the
8 conscience. Clearing a homeless encampment that has been
9 the site of an infant's death, a drug overdose death, a
10 homicide and more than 100 police calls in roughly 140 days,
11 and genuine concerns regarding criminal conduct and human
12 trafficking, does not shock the conscience.

13 With regard to the Eighth Amendment claim, the
14 Eighth Amendment prohibits government infliction of cruel
15 and unusual punishment. Whether the Eighth Amendment's
16 prohibition on cruel and unusual punishment may be applied
17 to regulating homelessness is the subject of some debate.
18 There is a petition pending in the Supreme Court to hear
19 that issue now accompanied by dozens of amicus briefs on all
20 sides. **See, City of Grants Pass v. Johnson**, and that is
21 Number 23-175.

22 The Ninth Circuit held in its **Martin** decision that
23 the Eighth Amendment prohibits the imposition of criminal
24 penalties for sitting, sleeping, or lying outside on public
25 property on homeless individuals who could not obtain

1 shelter. Its reasoning relied on a line of Supreme Court
2 cases holding that criminal penalties may not be inflicted
3 upon a person for being in a condition that she or he is
4 powerless to change. The Ninth Circuit held that just as
5 the state may not criminalize the state of being homeless in
6 public places, the state may not criminalize conduct that is
7 an unavoidable consequence of being homeless; namely,
8 sitting, lying or sleeping on the streets. That is a quote
9 from the **Martin** decision at 920 F.3d 617.

10 **Martin's** reasoning has not been addressed by our
11 Eighth Circuit Court of Appeals. The court in the Eastern
12 District of Missouri, which is within the Eighth Circuit, in
13 **Frank v. City of St. Louis**, 458 F.Supp.3d 1090, that
14 decision is from 2020. There, St. Louis was seeking to
15 close homeless encampments in the city within a certain area
16 and a resident of one of those encampments, Ms. Frank,
17 sought a TRO. Her claim was that closure of the encampment
18 would punish her based on her status as a homeless person in
19 violation of the Eighth Amendment under **Martin's** reasoning.

20 The district court in that case, Judge Pitlyk,
21 distinguished **Martin**. The **Martin** ordinances prohibited the
22 use of public property as a temporary or permanent place of
23 dwelling, lodging or residence, and occupying, lodging or
24 sleeping in any building, structure or public place, whether
25 public or private, without the permission of the owner or

1 person entitled to possession or in control thereof.

2 The Ninth Circuit recognized that the Eighth
3 Amendment's prohibition on cruel and unusual punishment bars
4 a city from prosecuting people criminally for sleeping
5 outside on public property when those people have no other
6 home or shelter to go to.

7 In **Frank**, though, there was no ordinance. The
8 city's notice and order to close the encampments was
9 expressly limited to a certain area rather than being
10 enforced citywide. St. Louis was, therefore, in the view of
11 the **Frank** court, not criminalizing the state of being
12 homeless or its unavoidable consequences, such as sleeping
13 in public. It was not clear to the **Frank** court, in fact,
14 that St. Louis was criminalizing homeless anywhere. At the
15 TRO hearing the city claimed it did not intend to arrest
16 individuals residing at the encampments.

17 Similarly here, Mayor Frey and the City are not
18 criminalizing the status of homelessness. Plaintiffs do not
19 allege that the City is outright prohibiting homelessness,
20 sleeping outside or anything of the sort. Rather, Mayor
21 Frey is alleged to be closing one encampment. Thus, even
22 assuming it to be good law, the Eighth Amendment theory the
23 Ninth Circuit adopted in **Martin** is one Plaintiffs are not
24 likely to prevail on here.

25 Turning to the conversion claim, the elements of

1 the conversion claim under Minnesota law are
2 straightforward. They are that the plaintiff has a property
3 interest and the defendant deprives a plaintiff of that
4 interest. However, there can be no conversion. Whereas, I
5 have found likely to be the case here, the government has
6 lawful justification to seize property.

7 The second ***Dataphase*** factor is irreparable harm
8 which occurs when a party has no adequate remedy at law,
9 typically because its injuries cannot be fully compensated
10 through a damages award. The harm must be likely in the
11 absence of an injunction, great, and of such imminence that
12 there is a clear and present need for equitable relief. The
13 plaintiff must show more than a future risk of irreparable
14 harm. There must be a clear showing of immediate
15 irreparable injury. Failure to show irreparable harm is an
16 independently sufficient ground upon which to deny a
17 preliminary injunction.

18 Here, Plaintiffs are not likely to suffer
19 irreparable harm attributable to the Mayor or City's
20 actions. To the extent Plaintiffs claim that irreparable
21 harm might flow from the destruction of property and
22 belongings, the City, as noted several times now, has shown
23 that it has given Plaintiffs an adequate, reasonable
24 opportunity to avoid that by storing any such belongings in
25 line with the City's arrangements. That any particular

1 plaintiffs have failed to take advantage of that option or
2 perhaps chosen deliberately not to means the property
3 destruction that will occur through clearing of the
4 encampment is effectively the plaintiffs' responsibility.

5 Plaintiffs also express concerns regarding the
6 consequences particular individuals may experience as the
7 result of being uprooted from the encampment.

8 They point out, for example, that some residents
9 of the camp have found stability and sobriety there and may
10 find it difficult to maintain their mental health and
11 sobriety away from the camp. There are three legal answers
12 to these concerns, but I should make clear that none of
13 these legal answers is intended to undermine these concerns'
14 genuineness or seriousness.

15 First, the City cannot fairly be faulted if a camp
16 resident experiences these challenges as the result of a
17 lawful removal and clearing of the camp, and I have found
18 that to be the case here.

19 Second, whether any particular plaintiff or person
20 will in fact experience these challenges represents the sort
21 of generalized non-imminent risk that is insufficient under
22 the law to show irreparable harm in the context of a
23 preliminary injunction.

24 Third, the City has not been blind to these
25 challenges. Its submissions describe extensive efforts to

1 connect those persons in the camp with resources to address
2 these and many other challenges.

3 The last two factors to consider are the balance
4 of the relative harms and the public interest. For
5 practical purposes, these factors merge when a plaintiff
6 seeks injunctive relief against the government.

7 As I observed at the start of this order, the
8 homelessness problem in Minneapolis, as in other places,
9 poses substantial challenges and societal harms to those who
10 are homeless, to the public, and to public officials. Here,
11 Plaintiffs have not shown that the policy choices Mayor Frey
12 has made to address these issues with respect to this
13 encampment are unlawful or create harms that are, as I have
14 said, so one-sided as to justify halting his decision to
15 clear the camp.

16 For all these reasons, then, I will order that
17 Plaintiffs' motion for a temporary restraining order and
18 preliminary injunction be denied, and I will order that
19 judgment be entered accordingly.

20 As I indicated earlier, that will be the only --
21 the transcript, that is to say, will be the only source of
22 memorialization of the terms of that order and memorandum.

23 I quoted a number of cases in the course of
24 explaining that decision. I chose not to cite the cases
25 simply for the sake of efficiency here today. I will leave

1 it to the lawyers if they are curious about that to obtain a
2 copy of the transcript and then conduct an appropriate
3 search to identify the source of those quotations. If the
4 lawyers have questions or concerns or have difficulty
5 finding any of those, please feel free to contact chambers
6 and I'll do my best to get you an answer.

7 Again, I thank the lawyers for their prompt work.

8 I should add I made this decision because I've
9 done my best to follow the law and this is where the law
10 leads me. I don't know what the best policy decision is
11 here. I think the lawyers on both sides, both as reflected
12 in their briefs and here today at the hearing, have done an
13 excellent job of conveying their clients' positions with
14 respect to those issues.

15 But I think it's important for me to be clear
16 again in just saying that making policy decisions is not the
17 job of a federal district court judge. My job is to compare
18 the legal arguments the lawyers have made with the law and
19 the standards for granting or governing the issuance or
20 denial of a preliminary injunction such as that is requested
21 here, and so that is the nature of the decision that has
22 been made today.

23 Let me stop there and ask, Ms. Kelley, anything
24 further that you think we need to cover here today?

25 MS. KELLEY: No, Your Honor.

1 THE COURT: All right. How about from the Mayor's
2 perspective?

3 MS. ENSLIN: No, Your Honor.

4 THE COURT: All right. Thank you, everyone.
5 We're adjourned.

6 (Proceedings concluded at 4:18 p.m.)

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9 **C E R T I F I C A T E**

10
11 I, **TIMOTHY J. WILLETTE**, Official Court Reporter
12 for the United States District Court, do hereby
13 certify that the foregoing pages are a true and
14 accurate transcription of my shorthand notes,
15 taken in the aforementioned matter, to the best
16 of my skill and ability.

17 */s/ Timothy J. Willette*

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Enslin Decl. Ex. A